TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 73

ARMOUR AND COMPANY, PETITIONER,

vs.

ADAM WANTOCK AND FRANK SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1944.

CERTIORARI GRANTED MAY 29, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

ARMOUR AND COMPANY,

Petitioner,

vs.

ADAM WANTOCK AND FRANK SMITH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

TRANSCRIPT OF RECORD

In the United States Circuit Court of Appeals For the Seventh Circuit

No. 8412

ADAM WANTOCK AND FRANK SMITH,
Plaintiffs-Appellees,

vs.

ARMOUR AND COMPANY, A CORPORATION,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE SUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

TRANSCRIPT OF RECORD FILED SEPT. 18, 1943.
PRINTED RECORD.

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8412

ADAM WANTOCK AND FRANK SMITH,
Plaintiffs-Appellees,

vs.

ARMOUR AND COMPANY, A CORPORATION,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX.

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable William H. Holly, District Judge of the United States for the Northern District of Illinois on the twenty-fifth day of June, in the year of our Lord one thousand nine hundred and forty-three, being one of the days of the regular June Term of said Court, begun Monday, the seventh day of June, and of our Independence the 167th year.

Present:

Honorable William H. Holly, District Judge.
William H. McDonnell, U. S. Marshal.
Roy H. Johnson, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

Adam Wantock and Frank Smith
vs.
Armour and Company, a corporation.
} Civil Action No. 2690.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint at Law in the above-entitled cause, in the office of the Clerk of the 8 District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 6th day of March, A. D. 1941.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

COMPLAINT AT LAW.

1. The Plaintiffs are residents of Chicago in the Northern District of Illinois, Eastern Division.

2. Plaintiffs bring this action to recover from Defendant unpaid minimum wages and unpaid overtime compensation and an additional equal amount of liquidated damages, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (Pub. No. 718, 75th Cong.; 52 Stat. 1060), hereinafter referred to as the Act.

3. The Defendant is a corporation, incorporated in the State of Illinois, and having its principal office and place of business in Chicago, in said Northern District of Illinois, Eastern Division.

4. This Court has jurisdiction of the subject matter hereof under Title 28 U. S. C. A. Section 41, and under Section 16, Paragraph B of said Act.

5. At all times hereinafter mentioned, Defendant has operated and is operating an establishment located at 1335 West 31st Street, Chicago, Illinois, and that at all times

hereinafter mentioned has employed and is now employing upwards of 1000 employees in and about said establishment in the acquisition, handling, manufacturing and distribution of goods and in the production of goods and in processes and occupations necessary to such production. The goods acquired, handled, manufactured and distributed, as aforesaid are and at all times hereinafter mentioned were for the most part purchased and transported in interstate commerce from and through States other than the State of Illinois to the aforesaid establishment at Chicago, Illinois and have been at all times hereinafter mentioned and are now being transported, shipped and delivered from said establishment in interstate commerce for the purpose of sale to other places within Chicago, Illinois and to, into and through States other than the State of Illinois.

The raw materials used in producing goods as aforesaid, are and at all times hereinafter mentioned, were for the most part purchased and transported in interstate commerce from and through States other than the State of Illinois to said establishment in Chicago, Illinois.

A substantial part of said goods produced by said employees of defendant as aforesaid, have been at all times hereinafter mentioned, and are now being produced in interstate commerce and are being transported, shipped and delivered in interstate commerce from said establishment to, into and through the State of Illinois.

At all times hereinafter mentioned, the plaintiffs were engaged in the production of goods and in processes and occupations necessary to the production of goods for interstate commerce.

6. During the period beginning October 24, 1938 continuously until October 23, 1939, the effective date of Section 6 (a) (1) of the Act, defendant violated said provision by paying the above named plaintiffs wages at rates less than twenty-five (25¢) cents per hour for their employment in interstate commerce and the production of goods and in processes and occupations necessary to the production of goods for interstate commerce as aforesaid in violation of Section 6 (a) (1), and during the period beginning October 24, 1939 the effective date of Section 6 (a) (2) and continuously to the date hereof, the defendant violated said provision by paying to the above named plaintiffs wages at rates less than thirty (30¢) cents per hour

for their employment for interstate commerce as aforesaid in violation of Section 6 (a) (2) of the Act.

7. The defendant violated the provisions of Section 7 (a) (1) of said Act by employing each of the plaintiffs for a work week longer than 44 hours between October 24, 1938 and October 23, 1939 and defendant violated Section 7 (a) (2) by employing each of the plaintiffs for a work week longer than 42 hours between October 24, 1939 and October 23, 1940, and defendant violated Section 7 (a) (3) by employing each of the plaintiffs for a work week longer than 40 hours between October 24, 1940 and continuously to the date hereof without paying said employees for their employment in excess of said specified hours at a rate not less than one and one-half (1½) times the regular rate at which they were employed.

8. Plaintiffs are not informed as to the exact amount of excess hours worked by each of them as employees of the defendant for which they have not been properly compensated in accordance with the Act; if the defendant kept accurate records as required by Section 11 (c) of the Act, the precise information as to the allegations herein are in the hands of the defendant. Plaintiffs are informed and believe and on such information and belief, state the fact to be that there is an excess of Five Thousand Dollars ($5,000.00) due and owing the plaintiffs for which they have not been properly compensated in accordance with the Act.

Wherefore, plaintiffs pray judgment for themselves; that they may have judgment for the sum of Five Thousand Dollars ($5,000.00) together with a like amount as liquidated damages and penalties as provided for in Section 16 (b) of the Act and that they may have costs herein and reasonable attorney's fees to plaintiff's counsel as provided for in the Act and that they may have such other and further relief as may be just and equitable in the premises.

Ben Meyers,
Meyers & Meyers,
Attorneys for Plaintiffs.

Meyers & Meyers
188 W. Randolph St.
Chicago, Illinois
State 0585

7 And afterwards, on, to wit, the 2nd day of April, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer in words and figures following, to wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption 2690)

ANSWER.

The Defendant answering the Complaint of the above named Plaintiffs respectfully alleges:

1. Defendant admits the allegations of Paragraphs 1 and 3 of the Complaint.

2. In answer to Paragraph 2 of the Complaint, Defendant denies that either of Plaintiffs is or was at any time referred to in the Complaint engaged in any occupation named in the Fair ~~Labor Standards~~ Act of 1938, or in any other act of which this Court has jurisdiction; and Defendant denies that either of said Plaintiffs is entitled to any wages, or overtime compensation other than such wages and compensation as Defendant has heretofore paid to each of said Plaintiffs.

3. Defendant denies the allegations of Paragraph 4 of said Complaint.

4. Answering Paragraph 5, consisting of four subparagraphs, Defendant admits the first three of said subparagraphs, but denies the fourth subparagraph thereof, and denies that either of said Plaintiffs were at any time after the passage of the said Fair Labor Standards Act engaged in the production of any goods, or in any process or occupation necessary to the production of any goods
9 for interstate commerce.

5. Answering Paragraph 6 of the Complaint, Defendant reaffirms the allegations of Paragraph 4 hereof, and further alleges that the compensation paid to each of said Plaintiffs, exceeded twenty-five cents per hour during the period October 24, 1938 to and including October 23, 1939 and exceeded thirty cents per hour on and after October 24, 1939.

6. Answering Paragraph 7 of the Complaint, Defendant denies that during any week between October 24, 1938

and October 23, 1939, it employed either of said Plaintiffs for a work week longer than forty-four hours; or, during any week between October 24, 1939 and October 23, 1940, it employed either of said Plaintiffs for a work week longer than forty-two hours; or, during any week since October 24, 1940, it employed either of said Plaintiffs for a work week longer than forty hours. And Defendant denies that at any time after October 24, 1938, it violated any of the provisions of said Fair Labor Standards Act as to either of said Plaintiffs, or that either of said Plaintiffs became entitled to any payment for overtime or for excess hours as alleged in the Complaint, or otherwise.

7. Answering Paragraph 8 of the Complaint, Defendant alleges that at all times and dates named in the Complaint, it kept accurate records of the exact amount of hours worked by each of said Plaintiffs, during each week, and that neither of said Plaintiffs worked in excess of the maximum number of hours.

Wherefore, Defendant respectfully prays that the suit of the above named Plaintiffs be dismissed and that Defendant have judgment for its costs and disbursements herein.

Armour and Company,
By Chas. J. Faulkner, Jr.,
Paul E. Blanchard,
Attorneys for Defendant.

Chas. J. Faulkner, Jr.,
R. F. Foegans,
Paul E. Blanchard,
Armour Building,
U. S. Yards, Chicago, Ill.,
Telephone: Yards 4745

Copy of the foregoing Answer of Defendant, Armour and Company, received this 2nd day of April, 1941.

Meyers & Meyers,
Attorneys for Plaintiffs.

And afterwards on, to wit, the 2nd day of October 1942, there was filed in the Clerk's office of said Court a certain Memorandum of the Hon. William H. Holly, District Judge, in words and figures following, to wit:

12 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

MEMORANDUM.

I am of the opinion that plaintiffs, members of the private fire fighting staff of defendant, are engaged in interstate commerce and are covered by the provisions of the Fair Labor Standards Act. *Kirschbaum* v. *Walling*, U. S. Sup. Ct. June 1, 1942. But there is some question as to what part of the time the firemen spent on the company's premises should be considered as working time.

A fireman employed by the company, to take a typical case, would "punch in" at a certain time in the morning and "punch out" nine hours later. During that time he would have one half hour for lunch. The next fifteen hours he is required to remain on the premises subject to call but ordinarily has nothing to do. Occasionally he may be called out if a fire happens but only occasionally and then for a short time. The employer contends that these fifteen hours should not be considered as hours of employment as he may then occupy himself in any way he desires that does not require him to leave the premises. Plaintiffs on the other hand contend that the whole of the fifteen hours should be considered as hours of employment.

I can not wholly agree with either contention. The hours of sleep, should not, in my opinion, be considered as hours of employment but the remaining portion of
13 that period should. The employee during that time has not freedom to do whatever he may desire, he may not be with his family, or attend a theatre or other place of amusement. He is serving his employer. *Travis* v. *Ray*, 41 Fed. Supp. 6. The situation is not the same as that of one living on the premises of the employer and subject to call but generally free to go or come as he pleases.

Most of the facts in this case have been stipulated but I will hear evidence at the convenience of the parties on the question of the number of hours for which, under the principle I have herein announced, plaintiffs are entitled to be compensated.

Holly,
Judge.

14 And afterwards on, to wit, the 5th day of April, 1943, came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation of Facts, in words and figures following, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STIPULATION.

1. It is stipulated and agreed that Frank Smith, 6645 South Oakley Ave., Chicago, Illinois, if called as a witness would testify as follows:

2. That he is a plaintiff in the instant case; that he maintains his residence at the aforesaid address where he lives with his mother, whom he supports with his earnings; that he is 55 years old.

3. That he has been employed by Armour & Co., 31st Street Auxiliary, commonly known as the Armour Soap Works as fire marshall since 1919, and has been so engaged during the period beginning October 24, 1938 to the present date.

4. That under the terms of employment, prior to December 2, 1939, plaintiff was required to start work at the hour of 8:00 A. M., at the beginning of a working week; at that time he punched the time clock and worked in the premises until 5:00 P. M. with the exception of one-half hour for lunch; that at 5:00 P. M. he was required to again punch the time clock. From 5:00 P. M. until the following morning at 8:00 A. M. he was required to stay on the premises to serve as a fire guard and to respond to any call by Company watchmen reporting a fire, or fire fighting equipment out of order. During such period plaintiff was not allowed to leave the premises of the fire hall; the fire hall being a part of the Company premises, and was required to prepare and eat his meals on the premises. Facilities were furnished by the Company for the preparation of meals but food was furnished by plaintiff. That at
16 8:00 A. M. the following morning he was required to punch the time clock again and begin his day of physical labor and continue the same, with the exception of one-half hour for lunch, until 5:00 P. M. when he was required to punch the time clock again and remain on the premises

and carry on the same duties and responsibilities as required the night before. At 8:00 A. M. (48 hours after reporting for work), he left the premises for home without having to punch the time clock; that he was not required to do any work, or be present on the premises for the following 48 hours, at the expiration of which he returned and repeated the same procedure as outlined heretofore; that he was on the premises 48 hours at a stretch and off the premises for 48 hours from October 24, 1938 until December 2, 1939; that this procedure continued until December 2, 1939.

5. That Frank Smith would further testify that the week beginning December 2, 1939 he was instructed by his superior, John L. Mulqueeny, Fire Chief, that thereafter he would be on a 24 hour shift and be off for 24 hours, and that he would continue the practice of punching the clock at 8:00 A. M. and again at 5:00 P. M. and remain on the premises from 5:00 P. M. to 8:00 A. M. to answer any calls for fire duty within the premises of the plant until the next morning at 8:00 A. M. at which time he was to leave for home and return to work 24 hours later. During the day hours of employment, that is from 8:00 A. M. to 5:00 P. M. plaintiff regularly performed physical labor, repaired fire fighting equipment or fighting fires but was entitled to take one-half hour off for eating purposes. During the night hours from 5:00 P. M. to 8:00 A. M. the next morning, plaintiff was to eat on the premises and could not leave the immediate vicinity of the fire hall; that Smith was on duty 24 hours and was off duty 24 hours from December 2, 1939 until the filing of this suit.

6. During the day hours, viz. 8:00 A. M. to 5:00 P. M. plaintiff's work consisted of inspection, cleaning, maintaining and repairing of fire fighting apparatus located in the plant. This would include the inspecting, maintaining and repairing of sprinkler lines; inspecting, washing and cleaning fire hose; inspecting and repairing, when necessary, fire extinguishers and fire fighting apparatus maintained throughout the plant; maintaining, repairing and filling all roof fire barrels and buckets maintained in or about the plant; answering any fire calls reported and fighting fires; and making reports to the fire department on any fire outbreaks.

7. During the hours from 5:00 P. M. of each day on duty to 8:00 A. M. the next morning, he was required to

remain in the immediate vicinity of the fire hall during all this period and to answer any fire calls made by watchmen and to fight fires as they occurred. That during these hours if a sprinkler break was reported by watchmen he was required to make temporary repairs. That during this period upon being notified by the watchmen that fire extinguishers and fire barrels were not filled or in proper order he was required to fill and put same in proper condition.

8. During the period on duty when not engaged in actual work, but available and ready for all such emergency calls, to-wit: during the hours from 5:00 P. M. to 8:00 A. M. Smith was not informed that he could, and did not in fact engage in any other gainful employment. But plaintiff occupied his time during such hours as he desired, save when responding to emergency calls as above explained. During this period he could not leave the vicinity of the fire hall for any purpose whatsoever and was on call of the defendant's watchmen at all times for the purposes heretofore recited.

9. The wages of Frank Smith for sometime prior to October 24, 1938, and thereafter to the day of the filing of the complaint herein were $35.55 per week; that the hours of employment are as indicated in Exhibit "A" hereto.

10. It is stipulated and agreed that Adam Wantock at the time of the filing of the suit was 33 years of age, that he was married, living with his wife and one minor child at 5625 W. 81st Place, Oaklawn, Illinois; that he had been employed at Armour & Co., 31st Street Auxiliary since 1935 as a fire marshall. That his wages have been, prior and during the period covered by this cause of action, $30.25 per week, and that the hours worked are as shown on Exhibit "B" and that his terms of employment, practices, hours of actual work, hours on duty when not engaged in actual work, hours off duty were in all respects governed by the same conditions as were Smith's hours; that he had the same privileges as Smith and that the conditions and practices governing his terms of employment were identical with Smith.

11. It is further stipulated and agreed that Arthur J. Clauter, of 9730 South Damen Avenue, Chicago, Illinois, if called as a witness would testify as follows;

2. That he is now, and at all times named in the com-

plaint herein has been, Assistant General Superintendent of the plant maintained by Armour and Company in the vicinity of 31st Street and Benson Street, commonly known as the Armour Soap Works; that during the period covered by the complaint herein he has had charge and general supervision of the hiring, discharge, lay-offs, and terms and conditions of employment of all employees now or heretofore on the payroll of Armour and Company at the aforesaid plant, including the plaintiffs Adam Wantock and Frank Smith; that he is familiar with the duties of each of the plaintiffs herein at all times during their employment.

3. The business of the Armour Soap Works consists of the converting, processing, producing and manufacturing of soap, glue, fertilizer, powder, greases, fats, etc., and that for each work week from October 24, 1938 to the present date most of the goods so converted, processed, produced, manufactured and worked upon were for sales, distribution and shipment in interstate commerce; and the raw materials acquired, handled, received and which were processed and worked upon during each work week since October 24, 1938 to the present date were for the most part received from states outside of the State of Illinois; that some of the raw materials and finished products are combustible and subject to loss by accidental fire; that he further states that Adam Wantock and Frank Smith were employed by the Company, among others, solely to maintain and repair fire fighting apparatus equipment and primarily to fight or check fires. That neither of said plaintiffs had any duties except such as was incidental to the purpose of their employment.

4. That during the time involved herein, and long
20 prior thereto it was and is the practice of the Company to operate its full time firemen (i. e., men employed for no purpose save maintenance and repair of fire fighting equipment, viz., hose, hydrants, pumps, water barrels and pails, etc., and the extinguishment of fire occurring on the premises) to require presence on the premises, of alternate shifts of firemen. Prior to the week ending December 2, 1939, a shift consisted of 48 hours, and after said date, 24 hours. Each fireman was and is required to be present on the premises for one shift (48 before December 2, 1939 and thereafter 24 hours) after which he was entirely free of any obligation to the Company

for a shift of equal duration (viz. 48 hours before December 2, 1939 and 24 hours thereafter).

5. Each shift during which the fireman was on the premises was divided into working time and stand by time. Each shift began at 8 A. M. of his day, or first day of his shift at which time the firemen punched the time clock evidencing their reporting in for service. From 8 A. M. until 5 P. M. of each such day (excepting one-half hour for lunch) firemen are actually and constantly engaged in physical labor. Such physical labor is expended entirely in the maintenance and repair of fire fighting equipment. Such equipment consists of fire trucks, hose, stationary pumps, water barrels, and water buckets, and extensive sprinkler system, fire extinguishers, and other like apparatus. The maintenance of such equipment requires drying and repairing of hose; oiling, greasing, gassing; filling tires and radiators, and occasionally repairing fire trucks; filling and repairing stationary water barrels and buckets; repairing defective pipe, sprinkler heads and connections in the sprinkler system; greasing, testing and repair of stationary water pumps and water lines and similar services.

6. At 5 P. M. of the same day each fireman again punched the time clock evidencing his completion of physical labor for that day, except for such emergency labor as might or might not be required. The firemen then retire to the fire hall provided by the Company, prepare their meals with food purchased by them on facilities provided by the Company. From 5 P. M. until the next 8 A. M. the fireman is free to occupy his time as he desires, subject only to emergency call by one of the plant watchmen. During this interval it is customary for firemen to occupy themselves reading, listening to radio programs, playing cards or other games; or otherwise occupy themselves. At whatever time each fireman desired, always subject to call by the said watchmen, he retired in a bed provided by the Company and (before Dec. 2, 1939) slept, if he desired, until it was necessary for him to again punch the time clock and report for active physical labor at 8 A. M. the second morning. After December 2, 1939 when the shift was reduced to 24 hours, he was free to sleep on Company premises, always subject to call by the watchmen, as long as he desired.

7. At 5 P. M. each evening, the custody of the entire plant except the fire hall, is turned over to a crew of night

watchmen, who patrol the premises on regular routes, and pull boxes at regular intervals. No fireman has access to any such portion of the plant except by permission of the watchman in charge of such portion. On their inspection tours the watchman are directed to watch for smoke or fires, and inspect the water and sprinkler systems. In the event any fire or smoke is detected, or any substantial leak or failure is found in the sprinkler or water systems, it is their duty to call the fire hall and call out sufficient firemen to handle the emergency situation. Subject to call from a watchman, the men present at the fire hall were not required to do any work or labor, or in any way deterred from occupying their time on the premises of the fire hall as they wish, between the hours of 5 P. M. and 8 A. M. the following morning.

8. In the event of any emergency call by watchmen, a record is kept of the time the firemen leave the fire hall and the time they return thereto, and in each case the Company recorded such calls.

22 9. That at no time during the ~~48 or 24~~ hour shifts referred to as working days of either plaintiff, was either plaintiff required or permitted to handle, process, prepare, transport, or in any way come in contact with any raw materials used in said plant, or with any supplies or equipment used in the production of goods at said plant, nor any partially or fully manufactured goods produced at said plant, excepting as access to fires or to fire fighting facilities or equipment needing repair, might require incidental handling of such materials or goods.

10. The witness is familiar with the assembly of raw materials, their manufacture into goods for sale and their distribution for sale from said plant throughout the United States; and is familiar with the effect upon such assembly, manufacture and distribution which would result from the discharge or lay-off of all of said firemen now or heretofore employed at said plant. The discharge or lay-off of all of said firemen would in no way, or manner affect the methods of raw materials assembly, manufacture and distribution of finished products from said plant, nor change in the methods employed, nor affect the volume or speed of production of said plant, except as an unchecked fire would interfere with said methods of assembly, manufacture or distribution.

11. The witness has custody and control of the time,

employment and payroll records of the two plaintiffs and of all other employees on the payroll at the same plant. He has prepared and attaches hereto as Exhibit A as to plaintiff Smith, and as Exhibit B as to plaintiff Wantock, transcripts of figures contained in said employment records wherein he has set forth for each week beginning October 29th, 1938, up to and including March 15, 1941, as to each of said employees, the number of days per week on duty; the number of hours each week off for lunch; the total hours each week during which each plaintiff either was at physical labor or present at the fire hall on defendant's premises; the total hours at regular labor (that is hours between 8 A. M. and 5 P. M. of each day on duty, minus hours off for lunch); the total hours expended each week at emer-
23 gency labor (that is, hours spent in responding to calls of the watchmen to put out fires or repair equipment during the portion of each day after 5 P. M. and until the following 8 A. M.); the total hours of physical labor performed each week; (regular and emergency); and the total hours on call at the fire hall on defendant's premises, during which no physical labor was performed except emergency labor, as hereinbefore defined. There is also set forth in the six right hand columns on Exhibits A and B, certain computations made by the witness from the data transcribed from the original payroll records above referred to. These are explained as follows:

12. The specific weekly salaries paid to each plaintiff were: Smith, $35.55; Wantock, $30.35. Such sums were paid to the plaintiffs regardless of whether they were on duty 3, 4 or 5 days each week; regardless of whether the total hours spent on defendant's premises each week were 70½ hours or 117½ hours; regardless of whether the hours spent at physical labor were 25½ hours or 50 hours; regardless of whether the time expended in the fire hall on defendant's premises after 5 P. M. and prior to the following 8 A. M. were 45 hours or 75 hours.

13. For the convenience of the Court, the witness has computed overtime upon two bases, shown on Exhibits A and B as overtime Basis 1 and 2. In each of these bases the witness has computed the fluctuating hourly rates resulting from the application of fluctuating hours worked (in Basis 1) and fluctuating hours on duty (in Basis 2) to fixed weekly wage paid. If the Court finds that either of the plaintiffs was subject to the Wage and Hour Act at

all, Basis 1 will reflect the overtime due if the Court finds that the hours of employment at physical labor, either regular or emergency, constitute the hours of employment within the meaning of the Wage and Hour Law. Basis 2 reflects the fluctuating hourly rates and sums due each week if the Court believes hours spent in the fire hall on premises of the defendant preparing and eating meals, sleeping, or amusing themselves, but on call for emergency duties, constitute hours of employment within the meaning of the Wage and Hour Law. In either case, there shall be added to the sums due an additional equal amount to determine the total amount due the plaintiffs with penalties as required by the Fair Labor Standards Act.

24 14. It is further stipulated and agreed that D. C. vonBehren if called as a witness for the defendant would testify as follows:

15. That he is now and for 19 years last past employed in the Insurance Department of Armour and Company at its Chicago office. Prior to that time he was employed in the Insurance Department of Morris & Company in Chicago, for a period of 3 years. For the past 19 years he has been head of the Insurance Department of Armour and Company, having jurisdiction of all fire and other insurance taken out by that Company throughout the United States; also supervision over fire prevention and protection matters.

16. That it is, and long has been, the practice of fire insurance companies to graduate the rate charged for fire insurance in accordance with the degree of risk presented. As a general rule a plant which maintains a fire department on the premises is accorded a far lower insurance rate than an identical plant which maintains no such fire department.

17. It is the practice of Armour and Company, in deciding whether or not to maintain a fire department at any of its 50 or 60 manufacturing establishments, to ascertain first upon what terms fire insurance will be issued at all; second, the cost of such fire insurance where a City fire department affords the only protection against fire; third, the cost of such fire insurance if a private fire department is maintained upon the premises. This difference in insurance rate is then weighed against the cost of maintaining a private fire department upon the premises and if the saving warrants the private fire protection is

installed. If the saving is insufficient the insured elects to pay the higher insurance rate and to rely upon the City fire department protection.

18. The witness has applied these principles to the plant at which the plaintiffs were employed. In the first instance the fire insurance companies would not insure the premises at all unless an hourly watching service were maintained. With private fire fighting personnel and equipment on hand they will accept the risk provided alternate hour watching service is maintained; that is, without a fire department the risk will not be assumed at any price, unless watchmen punch their clocks every hour, whereas with a private fire department the punching of the clocks every two hours will be permitted.

19. To provide for hourly watching service rounds instead of the present system of bi-hourly watching, would add 12 men to the payroll. Our average cost for watchmen at this plant is $28.26 per week. The 12 added men would produce an added cost of $17,634.24 per year. This is the first cost item eliminated by providing a private fire department. In addition to the added cost of this hourly watching service our fire insurance would be issued only at a premium which is $1200 per year higher than that charged under present conditions. The maintenance of defendant's fire department on the premises thus saves roughly, $19,000.00, in insurance costs and costs of added watching service each year.

Meyers & Meyers,
Attorneys for Plaintiffs.
Paul E. Blanchard,
Attorney for Defendant.

(Exhibit A—tabulated statement—attached—not copied.)

And afterwards on, to wit, the 9th day of September, 1943, came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulated Narrative Statement of Additional Testimony Taken and Depositions Offered at Supplementary Hearing Requested by the Court, in words and figures following, to wit:

27 DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STIPULATED NARRATIVE STATEMENT OF ADDITIONAL TESTIMONY TAKEN AND DEPOSITIONS OFFERED AT SUPPLEMENTARY HEARING REQUESTED BY THE COURT.

At the trial of this case, the following colloquy took place between the Court and counsel:

Mr. Baker: I do not have exact information at the present time as to whether the stipulation which has been filed is a part of the record in this case.

Mr. Blanchard: I think it is.

Mr. Baker: I know your Honor considered the stipulation when you prepared your memorandum.

The Court: Yes.

Mr. Blanchard: If not, we will so stipulate now.

Mr. Baker: It may be a part of the record?

Mr. Blanchard: Yes.

The witness FRANK SMITH called on behalf of the plaintiffs being first duly sworn, testified as follows:

My name is Frank Smith and I am one of the plaintiffs in this case. During the first period when I was required to be on duty 48 hours and off duty 48 hours, I would say that we slept whenever we considered it necessary to retire. When we felt like laying down, then we would lie down. I mean we went to bed. We slept 6, 7 or 8 hours.

28 I knew Adam Wantock. He worked on the same shift with me. He was an assistant of mine. He was younger. He was on duty and off duty the same time I was.

Mr. Blanchard: We have stipulated that the evidence and the facts and circumstances regarding Mr. Smith will inure to the benefit of all.

The witness continuing: Adam Wantock did not always sleep the same hours I did. He was a handy man, and was called upon to do other work; once in a while to help some of the mechanics.

The Court: If the stipulation says the same testimony shall apply to all, I suppose we will have to take it.

The Witness Continuing: If an alarm was sounded during the time we were asleep and we responded to that alarm, we did not later make up the time that we lost from our sleep. When we returned from the alarm, we only slept out the regular period of time.

Cross-Examination.

I think a report of the instances when we responded to these alarms in the hours of our residence was made up by ADT. I know that a record was kept of the time we spent responding to these night calls. On these nights we did not eat any dinner.

Mr. Baker: Objection on the ground it is covered by the stipulation.

The Court: I will hear it. I have forgotten all the terms of the stipulation. If it is contrary to the terms of the stipulation, all right.

Mr. Blanchard: It is beyond the scope of your memorandum of opinion. The memorandum of opinion simply set the case for hearing as to the hours that the plaintiff slept, but we think that automatically that throws open all the other hours during which the plaintiff was not gainfully employed at anything.

The Court: I will hear the testimony.

29 The Witness Resuming: We did not eat any dinner in the evenings, we were at the fire-house. We ate during the day time. We had a lunch period. We did not go without food until the next morning at breakfast. About 5 or 6 o'clock we could eat. We usually went to a restaurant. Once in a while we brought food from the nearest store, and cooked our own meals.

During the evening we had no time to go home. We could not leave the premises if we were alone. There were certain times when one man would be alone, and the only thing we could do was go to the nearest store and make arrangements with the watchman in case any trouble started that we would be there. We would buy our food and bring it to the fire-house and cook it there. While there was some inaction on the job we went out to a restaurant for our dinner, generally speaking. It didn't matter much whether it was an hour, it depended on the time we got

ready. We could not stay an hour and a half if we wanted to. It depended on the time it took for them to wait on us and to eat. Then we went back.

We were allowed an hour for dinner and were at liberty to either leave the premises and go to the restaurant or go out and get food and cook it on the premises.

Redirect Examination.

When we were in the building we were subject to call by the watchman. We were never called during the time we were in the restaurant getting dinner, but we were subject to call at all times.

Recross Examination.

The same was true during the lunch hour. If we were there during the lunch hour we would respond.

Witness Excused.

Mr. Baker: Mrs. Wantock, the widow of the other plaintiff is here. Her testimony would be substantially the same.

Mr. Blanchard: We are willing to stipulate that the testimony of Mr. Smith as to his hours will be the testimony of Mr. Wantock as to his hours.

Here the Plaintiffs Rested Their Case.

DANIEL M. FLICK, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

I am employed by Armour & Company as vice-president in charge of the Auxiliary plants at 31st and Benson Sts., Chicago and North Bergen, New Jersey. Mr. Smith and Adam Wantock were employed at the plant at 31st and Benson Streets, Mr. Smith is still employed there. Mr. Wantock was employed there until the time of his death, I assume.

In connection with the affairs of those plants, I am responsible to Mr. Eastwood, the president of the Company, and there is no other executive of the Company connected with the making of soap and related articles superior to me.

I have had the following experience in the soap making

industry. I started in 1910 and have been connected in the practical production of soap and the management of soap production and merchandising since that time. My progress through the industry was in the technical end where I started in 1910 and then I was a chemical engineer building glycerine plants and soap equipment for about five years, and was in essentially all of the principal soap companies in the United States. In 1916, I started working for Armour & Company as assistant plant superintendent of their Chicago plant, and devoted most of my attention to the production of soap and its by-products.

I am familiar with the disposition of the products made at both the Chicago and North Bergen plants. They are sold nationally, and considerable quantities are sold for export. I cannot say exactly but it is pretty well distributed throughout the United States. I would estimate that more than 60% passes out of Illinois, and about 80% of the North Bergen production is sold outside of New Jersey and is shipped to other points.

31 The other companies where I gained some knowledge of the production of soap and related articles are as follows: I worked in glycerine plants for Lever Brothers in Toronto and for Works Soap Company in Cincinnati and in a number of small companies.

We do not maintain at North Bergen a fire fighting organization or equipment such as we do in the Chicago plant.

The Court: I do not believe that has anything to do with the case.

The Witness, Resuming: We do not maintain a similar organization at the North Bergen plant because the Armour & Co. insurance department determines what type of fire protection our plants are subjected to, and I have nothing to do with that. We maintain a fire department where we are told to by the insurance department, and where they tell us not to do it, we do not maintain it.

The insurance department does not in any way control the production of goods at either of our plants.

It is my opinion that the maintenance of such a fire department as we have here in Chicago, as described by this record, is not necessary to the production of goods in a soap plant.

The Court: I do not think it is material. I do not think it has any bearing on the issues. It will be admitted subject to the objection. My opinion is they do maintain it.

whether it is necessary or not, and the persons employed there are engaged in interstate commerce.

Mr. Blanchard: That raises a point of law which is the crux of the case.

The Court: You may put in whatever evidence you desire on that question.

Witness Excused.

WILLIAM E. OYLER, called as a witness on behalf of defendant, having been duly sworn, testified as follows:

I am here in response to a subpoena. I live in Chi-
32 cago. I am employed by Lever Bros. in Hammond, Indiana. I am manufacturing superintendent in charge of production of soap and allied products. I have worked for Lever Bros. about 18 years. Before that time I was in the same line of work with the old N. K. Fairbank Co. here in Chicago.

I worked between 4 and 5 years at our headquarters in Mass. as assistant manufacturing superintendent. I go back there about 3 or 4 times a year on business and occasionally we go to other plants located in Baltimore and St. Louis.

I am informed by conferences with the managers of the other plants as to the nature of the personnel employed at such plants, particularly the headquarters plant. None of those plants maintains a regularly paid fire fighting force and the equipment such as a fire truck and fire hose.

In addition to the fire protection given by the Municipal Fire Departments in those cities, each plant has a local fire department selected from volunteers from various departments to take care of any emergency until the local fire department can be summoned. These volunteers are not primarily employed for their fire fighting knowledge and experience. They are selected from employees, who have been employed for regular work. If a man has been found to be a reliable individual, we select him from the operating force. They are employed primarily for manufacturing operations.

The four plants supply soap to all the states of the Union and the production of these four plants moves into interstate commerce from the States where their plants are located. In each of these plants the shipments to other

states is in a substantial quantity. In all cases a great majority is shipped to other states.

I have had something over 24 years experience in the production of soap and related articles. In my opinion, the maintenance of fire protection by especially hired firemen, who had no other duties, is not necessary to the production of goods for shipment in interstate com-
33 merce.

Cross-Examination.

We drill these employees whose duty is to protect against fire. The drill periods are not regular, but quite frequent. We have a regular campaign of instruction, approximately once a month. If a destructive fire should occur in the plant in Hammond, it certainly would have a substantial effect upon the amount of goods moved from the plant into other states.

Witness Excused.

Mr. Blanchard: Offers in evidence the deposition of Fred A. Brown, general superintendent of Proctor and Gamble Company.

Mr. Blanchard: This witness testified to the same effect as the last two witnesses on the stand, except that Proctor and Gamble have one plant where they maintain the fire truck and fire protection by only for eight hours a day.

Mr. Baker: It may go in subject to my general objection to that line of questioning.

Mr. Blanchard: We have in the mail deposition of Fred A. Wallner, general superintendent of Colgate, Palmolive, Peet Soap Company. It is to the same effect as the testimony of Mr. Oyler and the other witness.

The Court: It may be admitted subject to the same objection.

Mr. Baker: I would like the record to show my objection.

The Court: It may be considered the same as read at trial.

Here the Defendant Rested Its Case.

The Court: The testimony is he slept from 6, 7 or 8 hours. I think I should find the average sleeping time of 7 hours, and I think I should allow the hour they were allowed to go from the plant to their meals. That hour should be allowed against the working time.

34 Deposition of FRED A. BROWN:

Fred A. Brown being first duly sworn testified as follows:

I was served with a subpoena to take this deposition.

I live at Wyoming, Ohio. I am general superintendent of Proctor and Gamble Company and various subsidiaries. I have supervision over the various plants of Proctor and Gamble. I was employed by the Company in January, 1914. I was first with the Canadian factory in 1918. Since that time I have been in various positions in the manufacturing organization, including the Port Ivory New York factory, and later as division superintendent of eastern factories and also division superintendent of the central division factories, and more recently general superintendent. At present I have charge of the manufacturing operations in the following factories (naming 14 plants).

All of these factories except one are engaged in the manufacture and production of soap and related products. I am familiar in a general way with the disposition made by these factories of the soap and products which they manufacture. All the soap shipped by Proctor & Gamble Company and its subsidiaries is manufactured in these factories and is shipped to all the states and various other parts of the world. A large percentage of the soap and related products produced at each plant, is shipped across state lines in interstate commerce.

I have general knowledge of all the equipment carried in each of the plants and I am familiar with the personnel of those plants and the duties performed by the various employees. Each factory is equipped with a certain amount of fire protection equipment, such as fire hose, fire fighting tools, chemical extinguishers, sprinkler system, etc., varying with the size of the particular factory. The actual fire fighting is carried out by volunteer firemen recruited from the enrollment of the factory, who regularly performed other duties. These volunteers are periodically drilled in the performance of their fire fighting duties. The type of work performed by these men varies with the factories and they may be recruited from the skilled trades in a factory, general labor, production labor, etc., depending on the general qualifications of the individual. Generally those duties are connected with the manufacture

of the products which the Proctor & Gamble Company and its subsidiaries make.

As compared with their production duties, a very small percentage of the time of these employees is devoted to fire fighting.

We have some employees in these various factories who devote their entire time to matters connected with fire protection. This varies from a part time man at the small factories such as St. Louis, to as much of the full time of three to four men at the largest factory, located at Ivorydale, Ohio. We do not have as many as three or four full time men employed at fire protection work at any other plant.

At the second largest factory at Port Ivory, New York, we have equivalent of one and one-half full time men employed at such duties. Without definite knowledge, I would doubt that any other factory has as many as one full time man devoted to such duties. To the best of my knowledge at the present time, the only factories which employ one or more men at full time duty in matters related to fire protection are the Staten Island plant and the Ivorydale plant.

In general the duties of the full time men at the Ivorydale plant are inspection and maintenance of all fire equipment, such as fire hose, chemical extinguishers, sprinkler systems, fire hydrants, fire doors, inspection of factory buildings for fire hazards, etc. To the best of my knowledge one man is assigned at each factory to have charge of the fire drills for the volunteer employees.

36 At the Ivorydale factory only, we have a motorized fire truck which is housed in a garage used for this purpose only. It is the duty of at least one of the three or four men whose duties I outlined a minute ago to be responsible for maintaining and keeping this garage and fire truck in condition.

The history of the acquisition of this fire truck is as follows: Formerly we had fire equipment mounted on a truck and housed in what is known as the stable building at Ivorydale. This was not as centrally located as the present motorized equipment, and in the case of fire it was necessary for members of the volunteer fire fighting crew to go to this stable and haul the fire fighting equipment truck by hand to the location of the fire. This was obviously unsatisfactory because if the length of time required to get

the equipment to the scene of the fire. The motorized equipment was purchased to replace the hand-drawn equipment on my recommendation to give better fire protection facilities at the Ivorydale factory.

There is no similar equipment in any of the other thirteen factories. In those factories, the fire fighting protection is confined to the apparatus which I have described, such as hose, sprinkler system and tools supplemented by such help as is needed from local fire departments in the community.

The hours of labor of those various employees I have described as concerned with fire protection including those who devote their full time to that work and those who only devote part time, are normally eight hours a day. Their hours of labor are not any different from those generally of the production employees in the plant.

Deposition of FRED H. WALLNER:

My name is Fred H. Wallner. My address Jersey City. I am employed by the Colgate, Palmolive Peet Co. as a member of the home office industrial relations department in charge of statistics, safety plans and the policies. My duties are to oversee and direct safety activities within the organization, administer health and accident protection program, and the workmen's compensation self-insurance plan and advise, and after approval by the management, issue policies governing personal relations of the company, cover statistically the company's employment problems, oversee and administer such plans as group insurance, hospitalization, credit union, etc.

The Company operates five plants in the United States in the manufacture of soap and related articles. We manufacture soap products at all of the plants and at two of them, we also manufacture toilet articles. The home office is at Jersey City and my knowledge of production at the Jersey City plant comes from my personal inspection and acquaintance with the nature of the products manufactured there.

I base my knowledge with respect to the other plants on my personal visits and correspondence, except the one at Berkeley. I make no visits there. Also from reports

received from these plants. There are regular monthly reports on certain matters, and perhaps more frequently on others and still others only annually. I am currently acquainted with the nature of production at the several plants, and I am familiar with the disposition of the products manufactured at these several plants. They are sold to our trade and to jobbers usually in the area or in the States surrounding the plant.

I would say that the greater proportion of the products of any one of these plants was in interstate commerce.

I am familiar with the jobs, positions and capacities of personnel making up the employees of these several plants, and I am familiar with the nature and extent and scope of the employment of the personnel, through making periodic visits to four of the plants and receiving reports and data from all plants covering rates of pay, job classifications, etc.

38 These several plants of the Company which I have mentioned, do not maintain a privately maintained and operated fire house or privately maintained fire truck. We do not employ any persons at all in any of these plants which I have mentioned whose sole duty is to fight fires and maintain fire fighting and fire protection equipment.

Aside from watchmen and inspectors, we do not employ any other men solely for the protection of the plants against loss or damage by fire.

EXPLANATION OF AGREED COMPUTATIONS OF AMOUNT DUE, UNDER STIPULATION FILED HEREIN, DATED JUNE 25, 1943.

The stipulation of June 23, 1943, heretofore incorporated herein, named specific basic amounts due each plaintiff, on the assumption that the Court had correctly interpreted the law.

It is stipulated and agreed by the parties that the Appellate Court should be cognizant of the methods of computation agreed upon by the parties, by use of which the basic amounts named in such stipulation were arrived at. The aggregate amounts named in said stipulation were merely the aggregate of 239 separate computations in the case of Plaintiff Smith, and for 131 separate computa-

tions in the case of Plaintiff Wantock, one computation being made for each week worked.

The weeks so studied and computed naturally divide into two classes:

1. Weeks in which plaintiffs responded to no calls for emergency service. Typical of these weeks is the week worked by Frank Smith ending October 29, 1938. During that week Smith was on duty 5 days of 24 hours each, an aggregate of 120 hours. One and one-half hours of each day (7½ hours for the week) were spent at mealtims. The plaintiff slept seven hours per night (35 hours for the week). The Court held that such eating and sleeping time (42½ hours for the week) was not time at work.

Deducting the 42½ hours from the aggregate 120 hours on duty, left 77½ hours, which the Court adjudged to be working time within the meaning of the Wage and Hour Act. The overtime pay agreed and adjudged to be due Plaintiff Smith for this week was $7.68. Always assuming of course that the Court correctly interpreted the law.

Of the 77½ hours the defendant concedes that the plaintiffs were employed at manual labor 8 hours per day, or 40 hours of working time.

Of the 239 weeks covered by the judgment rendered for Frank Smith, 184 weeks were as illustrated above, i. e., no emergency service was rendered during sleeping or eating hours by Smith. Of the 131 weeks covered by the judgment rendered for Adam Wantock 92 weeks fell within this classification.

2. Weeks in which plaintiffs respondent to calls for emergency service during sleeping or eating hours.

For 55 of the 239 weeks worked by Frank Smith and 39 of the 131 weeks worked Adam Wantock, the plaintiffs responded to calls during their regular sleeping or eating time. On such occasions they repaired sprinkler heads or made other repairs or adjustments to fire apparatus as reported by the watchmen, or extinguished fires. In such 55 or 39 weeks the Court adjudged the time spent in responding to working calls, should be deducted from sleeping or eating time and added to time at work as defined by the Court.

Typical of these 55 and 39 weeks was the week ending November 12, 1938. Plaintiff Smith was on duty 5 days of 24 hours each or 120 hours. As in the previous case, but for an emergency call, he would have had 5 x 1½ hours off

for meals, and 5 x 7 hours off for sleeping, a total of 42½ hours for eating and sleeping. But during the week he responded to a fire or repair call for 1½ hours during his sleeping time. The Court deducted this 1½ hours from his usual 42½ eating and sleeping hours (leaving him but 40 41 eating and sleeping time) and added it to his working hours for that week. The liability of the Company for that week, on the agreed basis of computing the same, assuming the Court to have been correct, was $10.12.

It is further stipulated as to the 55 and 39 week periods within this classification, that the following is a correct Summary of the number, extent and duration of all emergency calls answered by Plaintiffs, during their entire period of employment, viz. 239 and 131 weeks respectively.

Emergency Calls of Plaintiff Smith for 239 Weeks Worked.

No. Weeks	Emergency Hours	Total Emergency Hours
1	7½	7½
1	4½	4½
1	3½	3½
1	3	3
1	2½	2½
1	2¼	2¼
1	2	2
2	1½	3
10	1	10
2	¾	1½
18	½	9
16	¼	4
Total 55		52¾

Emergency Calls of Plaintiff Wantock for 131 Weeks Worked.

No. Weeks	Emergency Hours	Total Emergency Hours
2	3	6
1	2½	2½
1	2¼	2¼
3	2	6
3	1	3
14	½	7
15	¼	3¾
Total 39		30½

H. E. Baker,
Attorney for Plaintiffs-Appellees.
Paul E. Blanchard,
Attorney for Defendant-Appellant.

41 And afterwards on, to wit, the 18th day of May, 1943 there was filed in the Clerk's office of said Court a certain Memorandum of the Hon. William H. Holly, District Judge, in words and figures following, to wit:

42 IN THE UNITED STATES DISTRICT COURT.

(Caption—2690)

MEMORANDUM.

I have considered the supplemental briefs of the parties and am still of the opinion expressed in my memorandum formerly filed herein that the plaintiffs, firemen employed for the protection of defendant's property from fire, are covered by the provisions of the Fair Labor Standards Act of 1938. In *Kirschbaum* v. *Walling*, 316 U. S. 517, the Supreme Court held that watchmen who protected the buildings in which the manufacturing operations were carried on from fire and theft "were engaged in occupations necessary to the production of goods for commerce by the tenants." If watchmen employed to protect the building in which production is carried on from theft and fire are

engaged in work necessary to the production of goods for commerce so are firemen employed to protect such buildings from fire hazards. Incidentally, it may be noted that Chief Justice Marshall in *McCulloch* v. *Maryland*, 17 U. S. 316, 413, held that the words, necessary, does not always "import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without the other," but that "it frequently imports no more than that one thing is convenient, or useful or essential to another." The work of the firemen here was useful and convenient in the production of defendant's good which went into the stream of interstate commerce.

Plaintiffs are entitled to judgment as heretofore indicated. An order accordingly will be entered May 21, 1943.

Holly,
Judge.

43 And afterwards, to wit, on the 25th day of June, 1943, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable William H. Holly, District Judge appears the following entry, to wit:

44. IN THE UNITED STATES DISTRICT COURT.

(Caption—2690)

Friday, June 25, A. D. 1943.

Present: Hon. William H. Holly, District Judge.

The Court having heretofore heard the evidence by the parties adduced and having considered the briefs submitted and being now fully advised in the premises it is

Ordered that judgment be entered herein that the plaintiff Adam Wahtock do have and recover of and from the defendant Armour and Company, a corporation the sum of Five Hundred Five and 67/100 Dollars ($505.67) for overtime compensation and the further sum of Five Hundred Five and 67/100 Dollars ($505.67) as liquidated damages and the further sum of Six Hundred Dollars ($600.00) for attorneys fees aggregating One Thousand Six Hundred Eleven and 34/100 Dollars ($1,611.34) and have execution therefor and it is further

Ordered that judgment be entered that the plaintiff Frank Smith do have and recover of and from the defendant Armour and Company, a corporation, the sum of Nine Hundred Forty-Three and 07/100 Dollars ($943.07) for overtime compensation and the further sum of Nine Hundred Forty-Three and 07/100 Dollars ($943.07) for liquidated damages and the further sum of Six Hundred Fifty Dollars ($650.00) for attorneys fees aggregating Two Thousand Five Hundred Thirty-Six and 14/100 Dollars ($2,536.14) and have execution therefor.

45 And afterwards on, to wit, the 20th day of August, 1943 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal, in words and figures following, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

Adam Wantock and Frank Smith,
vs.
Armour and Company, a corporation. } No. 2690.

NOTICE OF APPEAL.

Notice is hereby given that Armour and Company, a corporation, defendant appellant in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final judgment of the Court in this action entered on June 25th, 1943, awarding the plaintiffs-appellees herein judgment against the defendant-appellant in the basic sums of:

In favor of Adam Wantock $505.67 for overtime compensation and $505.67 as liquidated damages, and $600.00 for attorneys' fees aggregating $1,611.34;

In favor of Frank Smith $943.07 for overtime compensa-

tion and $943.07 for liquidated damages and $650.00 for attorneys' fees aggregating $2,536.14.

Chicago, Illinois, August 20th, 1943.

Charles J. Faulkner, Jr.,
John Potts Barnes,
Paul E. Blanchard;
Attorneys for Armour and Company defendant-appellant.
Office Address: Armour Building,
Union Stock Yards,
Chicago, Illinois.
Telephone No.: Yards 4745

(Attached is the following:)

47 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 20th day of August, 1943, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Ben Meyers of
Meyers and Meyers, 188 W. Randolph Street,
Chicago, Illinois.

Roy H. Johnson,
Roy H. Johnson,
Clerk.

(Seal)

48 And afterwards on, to wit, the 9th day of September, 1943 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points, in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STATEMENT OF POINTS.

Defendant-appellant intends to rely upon the following points on appeal of this proceeding:

1. The Court erred in holding that either of plaintiff-appellees herein were engaged in commerce, or in the production of goods for commerce within the meaning of Section 7 of the Fair Labor Standards Act of 1938 (Sec. 207, Chap. 8, Title 29, U. S. C. A.), or in any occupation necessary to such production within the meaning of Section 3(j) of said Act (Sec. 203(j), Chap. 8, Title 29, U. S. C. A.).

2. The Court erred in holding that either of plaintiff-appellees, while playing cards, listening to radio programs or otherwise amusing themselves while off duty on defendant-appellant's premises, were "employed" on at work, within the meaning of Sections 7 and 3(g) of the Fair Labor Standards Act of 1938 (Secs. 207 and 203(g), Chap. 8, Title 29, U. S. C. A.).

Dated Chicago, Illinois, Sept. 9th, 1943.

Paul E. Blanchard,
Of Attorneys for Defendant-appellant.

50 And afterwards on, to wit, the 20th day of August, 1943 came the Defendant-Appellant by its attorneys and filed in the Clerk's office of said Court its certain BOND ON APPEAL, in words and figures following, to wit:

51 Know All Men By These Presents:

That we, Armour and Company, as principal, and Maryland Casualty Company, a Maryland corporation of Baltimore, Maryland, as sureties, are held and firmly

bound unto Adam Wantock and Frank Smith in the full and just sum of Two Hundred Fifty and No/100 Dollars ($250.00) to be paid to the said Adam Wantock and Frank Smith, attorneys, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 14th day of July in the year of our Lord one thousand nine hundred and forty three.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Adam Wantock and Frank Smith *vs.* Armour and Company a judgment was rendered against Armour and Company in favor of Adam Wantock in the sum of $1611.34 and in favor of Frank Smith in the amount of $2536.14, a total of $4147.48 and the said Armour and Company having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the judgment of the aforesaid suit, in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof.

Now, the condition of the above obligation is such, that if the said Armour and Company shall pay the costs if the appeal is dismissed or the judgment affirmed, or pay such costs as the appellate court may award if the judgment is modified then the above obligation to be void; otherwise to remain in full force and virtue.

Armour and Company,
By H. G. Ellerd,
(Seal) *Vice-President.*

Maryland Casualty Company,
By John J. Pheland,
John J. Phelan,
(Seal) *Attorney-in-fact.*

Sealed and delivered in presence of:
Jessie Goodwill Hudson,
Paul E. Blanchard.

Approved by:

(Power of Attorney and Jurat attached not copied.)

52 And afterwards on, to wit the 9th day of September, 1943 came the parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation as to Contents of Record on Appeal, in words and figures following, to wit:

53 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2690)

STIPULATION.

It is hereby stipulated and agreed by and between Paul E. Blanchard, of attorneys for defendant-appellant herein and H. E. Baker, attorney for Plaintiff-appellees, that the following documents now of record in the Office of the Clerk of the above entitled Court, are designated as the parts, and all the parts of the record and proceedings to be included in the record on appeal; and that stipulations hereinafter referred to, and the narrative statement of the witnesses Frank Smith, Daniel Flick, William Oyler, Fred H. Wallner and Fred A. Brown, included herein, reflect all of the relevant facts bearing upon the issues to be considered on appeal:

1. The complaint.
2. The answer.
3. The stipulation of facts, excepting tabulated statement.
4. Memorandum opinion of the court dated Oct. 2, 1942.
5. Final memorandum opinion of the court dated May 21, 1943.
6. Judgment.
7. Notice of appeal.
8. Appeal bond.
9. Stipulated narrative statement of additional testimony, etc.
10. Defendant-appellant's statement of points relied upon.
11. This stipulation designating portions of the record in the court below to be included in the record on appeal.

Dated September 9th, 1943.

H. E. Baker,
Of attorneys for Plaintiff-Appellees.

Paul E. Blanchard,
Of attorneys for Defendant-Appellant.

54 Northern District of Illinois, } ss.
Eastern Division. }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Stipulation filed in this Court in the cause entitled Adam Wantock, et al. *vs.* Armour and Company, a corporation, Civil Action No. 2690, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 13th day of September, A. D. 1943.

Roy H. Johnson,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of printed record, printed under my supervision, and filed on the third day of November, 1943, in

Cause No. 8412

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of April, A. D. 1944.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our Independence the one hundred and sixty-seventh.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
No. 8412 *vs.*
Armour and Company, a corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Divis on.

And, to-wit: on the twenty-first day of September, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for Appellees, which said Appearance is in the words and figures following to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Cause No. 8412

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant.

The Clerk will enter appearance as counsel for Plaintiffs-Appellees.

Ben Meyers,
(Name)
188 W. Randolph St.,
(Address)
Chicago.
Individual and not firm names must be signed.

Endorsed: Filed September 21, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the first day of October, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Cause No. 8412

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant.

The Clerk will enter appearance as counsel for Defendant-Appellant.

Paul E. Blanchard,
(Name)
Armour Bldg, 43rd and Racine Ave.,
Chicago, Ill.
(Address)

Chas. J. Faulkner, Jr.,
(Name)
Armour Bldg, 43rd and Racine Ave.,
Chicago, Ill.
(Address)

John Potts Barnes,
(Name)
Armour Bldg, 43rd and Racine Ave.,
Chicago, Ill.
(Address)

Individual and not firm names must be signed.

Endorsed: Filed October 1, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the nineteenth day of January, 1944, the following further proceedings were had and entered of record, to-wit:

Wednesday, January 19, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Adam Wantock and Frank Smith, *Plaintiffs-Appellees*, vs. Armour and Company, a corporation, *Defendant-Appellant*. } No. 8412 } Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel, and on oral argument by Mr. Paul E. Blanchard, counsel for appellant, and by Mr. Hart E. Baker, Counsel for appellees, and the Court takes this matter under advisement.

And afterwards, to-wit: On the fifth day of February, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 8412. **October Term, 1943, January Session, 1944.**

ADAM WANTOCK and FRANK SMITH,
Plaintiffs-Appellees,
vs.
ARMOUR AND COMPANY,
a Corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

February 5, 1944.

Before EVANS and SPARKS, *Circuit Judges*, and LINDLEY, *District Judge*.

EVANS, *Circuit Judge*. This appeal involves the application and construction of the Fair Labor Standards Act. Specifically it is an action brought by two of defendant's employees to recover overtime compensation and liquidated damages. The terms of their employment were unusual and out of the ordinary in that, as auxiliary firemen, they were employed during one period on a 48-hour work shift with the ensuing 48 hours off and during another period there were alternating stretches of 24 hours on and 24 hours off.

During the work periods, appellees performed active, specific services from 8 A. M. until 5 P. M., with a half hour for lunch. At 5 P. M., their active labor ceased, and appellees were free to do as they pleased until 8 o'clock the next morning, *subject*, however, to the restriction that they had to remain in the firehouse so as to be subject to call in case of fire. They devoted this time from 5 P. M. to 8 A. M. to such recreations or sleeping or eating as their natures and desires dictated. They responded to fire calls if any were made, which was seldom.

Plaintiff Smith, on an average, responded to a call about

once every four weeks, while Wantock was called once every three and one-half weeks. Smith's longest call took seven and a half hours, while Wantock's longest was three hours. The average call for Smith was fifty-eight minutes and for Wantock, forty-seven minutes.

Speculation suggests that the employees divided their time between reading, listening to the radio, solitaire, gin rummy, and sleeping. The District Court found, on the basis of scant testimony, that the employees devoted one and one-half hours to eating and seven hours to sleeping each twenty-four hours. It made deductions accordingly.

The judgment for Wantock was for overtime compensation of $505.67 and liquidated damages of $505.67 and $600 for attorneys' fees. The judgment for Smith was similar, excepting as to amounts. Overtime was $943.07, liquidated damages, $943.07, and attorneys' fees of $650.

Two questions are raised:

(a) Were plaintiffs engaged in the production of goods for commerce within the meaning of Title 29, Sec. 203 (j) and Sec. 207, U. S. C. A.?

(b) Did plaintiffs work in excess of the maximum hours permitted by Title 29, Sec. 207, U. S. C. A., without payment of overtime wages?

(a) We are bound by the decision of the Court in *Walton* v. *Southern Package Corporation*, decided by the Supreme Court, January 3, 1944, and hold that plaintiffs were within the coverage of the Act in question. In other words, an auxiliary fireman is not unlike a night watchman, and his services are necessary for the production of goods for commerce so as to fall within the holding of this decision, which is binding upon us. See also, *Kirschbaum* v. *Walling*, 316 U. S. 517, which in the opinion of the concurring Justice bound him to the conclusion expressed in the majority opinion in said Walling case.

(b) On the second question, appellant cites, and relies heavily on, *Skidmore* v. *Swift & Co.*, 136 F. 2d. 112, which is nearly in point, but is distinguishable in fact from the instant case in that there the employer and employee agreed to special separate compensation in case the employees received a fire call. Appellant attempted to avoid this fact distinction by saying that here the employees were paid for the fire call service on the basis of weekly compensation whereas in the Skidmore case, the employees

were paid extra, on an hourly basis, for answering fire-alarm calls.

We think the appellant has not overcome the fact distinction of the Skidmore case, although we are not certain that such distinction would or should materially affect the conclusion.

It seems to us that the question is one which only the court of last resort can answer finally, and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court.

Our conclusion is that the decision must turn on the language of the Act. Congress, not the court, was legislating. Responsibility for this legislation in general and the exceptions and limitations of the Act rests with the Congress. The courts only apply the Act and, in case of doubt, perhaps, give it a construction which the language of the Act and the purpose of the legislation, demand. In this last function—if the language of any section necessitates it—we may not overlook the purposes or object of the legislation and the intent of Congress in choosing its language.

Section 207 is definite and specific and provides that:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) . . .

"(3) . . .

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed."

Then follow exceptions wherein definitions are given of the instances where the employer would not be deemed to have violated this section. None of the exceptions includes a situation such as is here disclosed.

If there is to be an exception, in addition to those specifically made, added to Section 207, it is for Congress rather than the courts to make it.

The only legal question, as we see it, is, therefore, directed to the ascertainment of the legal status of the plaintiffs to the defendant during those periods when they were

subject to call as auxiliary firemen. Notwithstanding the latitude they had in their activities, we are convinced that their legal status was that of employee during that time.

Inconsistency is at once suggested when a distinction is made between an employee living in the packing house, who is subject to call, but who is sleeping, and one who is subject to call and is listening to the radio or playing solitaire. The correctness of the District Court's holding that time devoted to sleeping and eating should not be counted as part of overtime, is not before us. The employees have not appealed from that part of the judgment, which is adverse to them. Therefore no question of difference between sleeping and eating on the one side and playing solitaire, listening to the radio or reading on the other hand, is before us.

It is perhaps true that Congress did not visualize a case of this kind when the Act was passed. If this be a sound premise, we suggest without temerity, and we hope without appearing immodest, that it would be highly appropriate for Congress to amend the Act. Surely courts *cannot*, or, it might be more correct to say, *should* not do the amending.

The judgment is

AFFIRMED.

SPARKS, *Circuit Judge*, dissents.

Endorsed: Filed February 5, 1944. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the fifth day of February, 1944, the following further proceedings were had and entered of record, to-wit:

Saturday, February 5, 1944.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Walter C. Lindley, District Judge.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
No. 8412 *vs.*
Armour and Company, a corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs, and interest from the date of the judgment of the said District Court until paid at the same rate that similar judgments bear in the Courts of the State of Illinois.

And afterwards, to-wit: On the thirteenth day of March, 1944, the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit: On the twenty-fourth day of March, 1944, there was filed in the office of the Clerk of this Court, a Motion to Amend Judgment, etc., which said Motion is in the words and figures, following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
vs.
Armour and Company,
a corporation,
Defendant-Appellant.
} No. 8412.

MOTION

Now come the plaintiffs-appellees in the above entitled cause by Ben Meyers and Hart E. Baker, their attorneys, and move the Court to amend the judgment heretofore entered in this cause on February 5, 1944, by including therein an allowance of a reasonable attorneys' fee to be paid by the defendant-appellant to the plaintiffs-appellees for services in this Court of the attorneys for the plaintiffs-appellees, and for the purpose of making such amendment to said judgment, and for no other purpose; the plaintiffs-appellees move the Court to recall the mandate heretofore issued and forwarded to the Court below on March 13, 1944.

And in support of the foregoing motion, the plaintiffs-appellees file herewith and attach hereto their suggestions and affidavit.

Ben Meyers,
H. E. Baker,
Attorneys for Plaintiffs-Appellees.

SUGGESTIONS IN SUPPORT OF THE FOREGOING MOTION.

I.

This suit was commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division at Chicago, under the Fair Labor Standards Act of 1938, hereinafter called the Wage and Hour Act, to recover unpaid overtime compensation, liquidated damages, attorneys' fees and costs as provided in said Act.

II.

Judgment was entered in favor of the plaintiffs and against the defendant in said District Court, in which judgment the District Court allowed and included the sum of $600 as attorneys' fees for the plaintiff Adam Wantock, and $650 as attorneys' fees for the plaintiff Frank Smith for services rendered in said District Court up to and including the entry of judgment.

III.

The Wage and Hour Law provides in Section 16(b) as follows:

> "Any employer who violates the provisions of section 6 of section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

IV.

An additional allowance of attorneys' fees for services rendered upon an appeal was awarded by the Supreme Court, Appellate Division, First Department, of the State of New York, November, 1943, in the case of *William J. O'Neil, Respondent*, v. *Brooklyn Savings Bank, Appellant*, No. 13696. A copy of the opinion in that case is hereto attached:

V.

The services rendered by the attorneys for the plaintiffs-appellees in this cause subsequent to the judgment entered in the District Court pertaining to this appeal were as follows:

August 20, 1943—Examination and approval of appeal bond.

August 21, 1943—Notice of appeal received and examined.

September 9, 1943—Statement of points to be relied on by defendant-appellant received and examined. Stipulation as to contents of record on appeal examined and approved.

November 4, 1943—Printed record received and examined, 36 pages.

November 19, 1943—Stipulation extending time of defendant-appellant to file its brief.

December 20, 1943—Notice from Clerk setting case for hearing.

December 21, 1943—Stipulation extending time of plaintiffs-appellees to file their brief.

December 24, 1943—Notice from Clerk of order extending time.

January 18, 1944—Reviewing case and preparing case for hearing.

January 19, 1944—Appearance and oral argument before Circuit Court of Appeals.

Briefs.

December 7, 1943—Brief of defendant-appellant received and examined, 39 pages, citing 35 cases.

January 15, 1944—Brief of plaintiffs-appellees, consisting of 16 pages, citing 15 cases, 4 texts and statutes. The net cost of printing same was $17.60.

January 22, 1944—Reply brief of defendant-appellant received and examined, 28 pages, citing 61 cases.

State of Illinois, } ss.
County of Cook. }

Hart E. Baker, being first duly sworn, on oath states that he is one of the attorneys for the plaintiffs-appellees in the above entitled cause and that he had full charge of this case from the time that judgment was entered in the District Court up to the present time and that he has personal knowledge of all the services that were rendered pertaining to the appeal in this matter, and that the foregoing statement of services is true.

Hart E. Baker.

Subscribed and Sworn to before me this 23rd day of March, A. D. 1944.

Harriett Blum,
(Seal) *Notary Public.*

VI.

The principal questions in the case were:

a. Whether the plaintiffs, who were not engaged in the manual production of goods for commerce, but who were engaged in the protection from fire of such goods and of the premises where they were produced, were covered by the Act.

b. Whether such employees, when at rest but subject to call to provide such protection whenever needed, were engaged in commerce or processes necessary to the production of goods for commerce, and hence, covered by the Act.

These questions were novel and difficult, were vigorously contested by defendant-appellant, and were decided favorable to the contention of the plaintiffs-appellees.

We therefore suggest that this Court allow an attorneys' fee in accordance with the Act, for services rendered in this Court in this case, in such amount as is consistent with the nature and quality of the services rendered by the attorneys for plaintiffs-appellees, and standing and dignity of this Court.

Respectfully submitted,

Ben Meyers,
Hart E. Baker,
Attorneys for Plaintiffs-Appellees.

SUPREME COURT, APPELLATE DIVISION,

First Department, November, 1943.

Alfred H. Townley,
Edward J. Glennon,
Irwin Untermyer,
Edward S. Dore,
Joseph M. Callahan, *JJ.*

William J. O'Neill,
Respondent,
vs.
Brooklyn Savings Bank,
Appellant.
} No. 13696.

Appeal by permission of the Appellate Term of the Supreme Court from its determination reversing a judgment of the Municipal Court of the City of New York, Borough of Manhattan, First District, in favor of defendant, and directing judgment in favor of plaintiff.

Per Curiam:

We appreciate that the result of our decision may seem harsh. The harshness, however, is inherent in the legislation and in the decisions which have construed it. As was said in *Peter Rigopoulos, et al.* v. *Kervan*, U. S. C. C. A., "We see no escape from the statutory language."

Under the circumstances of this case, however, especially in view of the small amount involved and that costs will be awarded to the plaintiff, we think a counsel fee of $100 for services heretofore rendered, in addition to a counsel fee of $50 for services rendered on this appeal, is fair and reasonable. The determination of the Appellate Term and the judgment entered thereon should be modified accordingly and, as so modified, affirmed with costs of this appeal to the respondent.

Endorsed: Filed March 24, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the thirty-first day of March, 1944, there was filed in the office of the Clerk of this Court, Suggestions of Defendant on Motion of Plaintiff, which said Suggestions are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
vs.
Armour and Company,
a corporation,
Defendant-Appellant.
} No. 8412.

SUGGESTIONS OF THE DEFENDANT UPON THE MOTION OF PLAINTIFFS' COUNSEL FOR THE ALLOWANCE OF ATTORNEY'S FEE.

We leave to the discretion of the Court the basic question of the propriety of the allowance of any attorney's fee in this Court. The suggestions here incorporated bear upon the amount of such fee.

As indicated in the suggestions of plaintiffs' counsel, filed in support of its motion, the District Court allowed two attorney's fees, one in each of the cases originally filed in that Court. The record clearly shows that but one of those cases was actually tried, the other being covered by a stipulation of the parties that the relevant facts with reference thereto were identical and that the decision of the single case should control as to both cases.

We respectfully submit that while counsel suggests numerous services rendered on behalf of his clients, that there are but two items of such service that imposed any material demand upon counsel's time or skill. The two major items of service rendered by plaintiffs' counsel in this Court had to do with the briefing and argument of the case herein. Even that task was already partially per-

formed. The case was fully briefed by both parties in the court below. Assuming that counsel exhausted the possibilities provided by the authorities up to that time, there remained only the consideration of such authorities as had been announced since the initial preparation of the case was made in the District Court.

The other items recited by counsel, which are disassociated from the presentation of the brief and oral argument, are all routine matters such as are performed in the usual law offices by clerks. Thus the examination of the appeal bond, the notice of appeal and of the appellant's statement of points, are routine matters which, to the experienced lawyer, require but minutes of his time. The examination of the printed record, prepared as it is by the Court Clerk, is merely a matter of checking the inclusion therein against the stipulation. This can be done by any intelligent clerk or private secretary. The stipulations for extension of brief dates are similarly routine matters usually handled by law clerks or experienced private secretaries. The notices received from the Clerk of this Court are brief and require only the most casual reading. Based upon our experience, we doubt if more than two hours of counsel's time was consumed by all the services rendered in this Court aside from the preparation of the brief and oral argument. And, the caliber of those services was entirely clerical, rather than legal. As to the briefing and argument of the case, we call the Court's attention to the fact that counsel had been compensated for a large portion of the time necessary to prepare the brief and argument in this Court by the attorney's fee granted by the lower Court, since the only new task consisted in a consideration of the authorities announced since the submittal of the case to the Court below.

Respectfully submitted,

Paul E. Blanchard,
Of Attorneys for Defendant-Appellant.

Endorsed: Filed March 31, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: on the fourth day of April, 1944, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 4, 1944.

Court met pursuant to adjournment.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,
No. 8412 *vs.*
Armour and Company,
a corporation,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the motion of counsel for appellees to amend the Judgment herein to include an allowance of attorneys fee to be paid by appellant to appellee, and to recall the Mandate, be, and it is hereby, denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of proceedings had and papers filed, excepting briefs of counsel, and stipulations, motions and orders extending time for briefs, in

Cause No. 8412.

Adam Wantock and Frank Smith,
Plaintiffs-Appellees,

vs.

Armour and Company, a corporation,
Defendant-Appellant,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of April, A. D. 1944.

(Seal)

Kenneth J. Carrick,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 73

ORDER ALLOWING CERTIORARI—Filed May 29, 1944.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 218, Skidmore vs. Swift & Co. The Solicitor General is invited to file a brief amicus curiae if he is so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to